

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH G. HUNN

Claimant

VS.

MONTGOMERY WARD

Respondent

Self-Insured

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Docket No. 205,440

ORDER

Respondent requests review of the preliminary hearing Order entered by Administrative Law Judge Alvin E. Witwer on December 19, 1995.

ISSUES

The Administrative Law Judge granted claimant workers compensation benefits for a February 13, 1995 work-related accident. Respondent requested this review and contends that claimant failed to prove he sustained personal injury by accident arising out of and in the course of his employment with the respondent. That is the sole issue now before the Appeals Board in this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for purposes of preliminary hearing the Appeals Board finds:

(1) Under K.S.A. 44-534a, the Appeals Board has the jurisdiction and authority to review disputed preliminary hearing findings involving the issue whether claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent.

(2) The preliminary hearing Order should be affirmed.

Claimant worked for the respondent for twenty-three (23) years. He alleges he injured his back on February 13, 1995 while lifting televisions. Because claimant has a long history of back problems, including surgery and intermittent numbness and shooting pain in his leg since 1993, respondent contends claimant did not satisfy his burden of proof.

Claimant testified he now believes he sustained additional injury to his back on February 13, 1995, because after immediately lifting one particular television he

experienced a constant pain radiating into both legs, a symptom he had not experienced for quite some time. However, at the time of the incident claimant was not aware he had sustained additional back injury because he initially thought his symptoms were related to his preexisting back problem, which he had previously been told was arthritis and chronic back syndrome.

The afternoon of the incident claimant told one of his supervisors, Nadine Sindridge (ph), that he had hurt his back earlier that day and that it was very painful. Despite worsening symptoms, claimant completed the workday and worked the next two days, Tuesday and Wednesday, February 14 and 15. On Wednesday, February 15, claimant advised his manager, Mike Stuckey, that he had hurt his back and that he might not come into work the next day because he felt he needed to rest his back.

Rather than reporting to work on February 16 and 17, claimant went fishing with a friend. When claimant returned to work on Monday, February 20, he was terminated because of poor attendance.

Claimant first consulted a physician for this alleged accident in August 1995. Between February and August, claimant testified he took pain pills for his back and did not injure his back in any other incident. After being terminated, claimant did not work for any other employer although he did draw unemployment benefits for approximately four months and in July 1995 started his own business working from his garage where he repaired light electronic equipment. Because he was unable to lift any significant weight, claimant testified he would not even attempt to work on heavier items.

Claimant presented the medical report of Glenn M. Amundson, M.D., dated September 18, 1995. Dr. Amundson's letter in referring to claimant states, "On 2/13/95 he suffered a significant on-the-job injury that has markedly changed and exacerbated his back and leg pain pattern." The doctor's letter also indicates an MRI taken on August 17, 1995 shows a small left-sided disc herniation at the L5-S1 level, and a large free-fragment at the L3-4 level which is central and paracentral to the right. These MRI findings are new and clearly different from an earlier MRI study done in 1993.

Respondent presented the testimony of Greg Fields, the service manager over claimant, and Denise Calbert, the human resource director for the facility where claimant worked. Mr. Fields testified that on February 15 he asked claimant if he were hurt and claimant replied that he was not but that he needed a couple of days off for beer and rest. However, he acknowledges he learned that day that claimant was claiming he was injured at work on February 13. He also acknowledges that claimant was told several times in that conversation he would need a doctor's note before he could return to work and that he telephoned claimant's house on numerous occasions on February 16, 17 and 18 to attempt to determine if claimant was home and unable to work. Ms. Calbert testified about her knowledge of conversations with claimant on February 20 regarding his need to obtain a doctor's statement to return to work and a telephone conversation she had with him in August 1995.

Based upon this evidence, the Administrative Law Judge awarded claimant workers compensation benefits. The Appeals Board agrees with the Judge's conclusion as it is supported by Dr. Amundson's report and the testimony of the witnesses. Respondent seems to argue that claimant was not injured at work on February 13 because he went fishing on February 16 and 17. Although it may have been unwise for claimant to go fishing on those two days, the evidence is presently uncontroverted that he advised three of his supervisors before he left work on Wednesday, February 15, that he had hurt his back on February 13 and was having significant symptoms. The present record fails to establish, or even suggest, that claimant had a subsequent injury after leaving

respondent's employment although it does indicate claimant continued to experience ongoing problems until he saw Dr. Amundson in August 1995.

Based upon the entire record presented to date, the Appeals Board finds claimant has proven that he sustained personal injury by accident arising out of and in the course of his employment with the respondent on February 13, 1995.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Alvin E. Witwer dated December 19, 1995, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David W. Whipple, Kansas City, Missouri
Thomas V. Clinkenbeard, Kansas City, Missouri
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director